

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

TRUCK INSURANCE EXCHANGE,)
)
 Petitioner,)
)
 v.) No. 22-1079
)
 KAISER GYPSUM COMPANY, INC.,)
)
 ET AL.,)
)
 Respondents.)

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11 Washington, D.C.

12 Tuesday, March 19, 2024

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14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 11:37 a.m.

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11 behalf of the Claimant Respondents.

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1 P R O C E E D I N G S

2 (11:37 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 22-1079, Truck Insurance
5 Exchange versus Kaiser Gypsum Company.

6 Ms. Ho.

7 ORAL ARGUMENT OF ALLYSON N. HO

8 ON BEHALF OF THE PETITIONER

9 MS. HO: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 If anyone is a party in interest
12 entitled to be heard in this Chapter 11 case,
13 it's the insurer, Truck, who will pay virtually
14 every dollar the debtors owe the asbestos
15 claimants.

16 Yet, the Fourth Circuit's rule denies
17 that insurer a voice. That rule, which my
18 friends barely defend, violates the text,
19 context, and history of 1109(b).

20 It also defies the practical reality
21 that Chapter 11 cases are, as this Court has
22 recognized, collaborative, working best when all
23 stakeholders come together at the outset to hash
24 things out.

25 Congress recognized that reality and

1 spoke expansively in 1109(b) to extend the right
2 to be heard to any issue. Congress also gave
3 courts a duty to ensure compliance with the code
4 and invited broad participation to help
5 discharge that duty. 1109(b)'s breadth is a
6 feature, not a bug.

7 It's now common ground that a party in
8 interest is one who could be directly and
9 adversely affected by the case. That's Truck in
10 at least two ways.

11 First, it's the insurer paying the
12 vast bulk of claims against the debtors. In the
13 government's terms, it's a contracting party.
14 From the start then, Truck's rights could have
15 been directly and adversely affected by this
16 case. The proof of that pudding is in the plan
17 finding, which resolved key -- a key coverage
18 dispute against Truck.

19 Second, Truck's a creditor for
20 millions in insurance deductibles.

21 For both reasons, 1109(b)'s plain
22 terms entitle Truck to be heard on any issue.

23 In silencing Truck, the Fourth Circuit
24 violated those terms by limiting who a party in
25 interest is and what issues they can raise.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Ms. Ho, at what point
3 do you determine the status of party in
4 interest?

5 MS. HO: Thank you, Justice Thomas.
6 At the -- at the outset. Section 1109(b)'s text
7 refers to be heard under any issue in this case.
8 So we think that has to be an ex ante inquiry,
9 in part because there are other provisions of
10 the code apart from 1109(b) that affect parties
11 in interest that don't depend on a specific plan
12 or any plan.

13 JUSTICE THOMAS: Well, the -- in this
14 case, the -- the determination at the end or --
15 or in -- was that Truck was not negatively
16 affected. How could you determine that at the
17 -- at the beginning of the proceedings?

18 MS. HO: Yes, Your Honor, because I
19 think the question should be "could," could --
20 could the entity be affected by the Chapter 11
21 case. And as the insurer, there are any number
22 of ways that Truck could have been affected. It
23 could have been affected by a plan that -- that
24 resulted in one, as we were seeking, with fraud
25 prevention measures, or it could have resulted,

1 as had happened, in a plan that didn't include
2 those.

3 We -- we came into this Chapter 11
4 proceeding as a creditor. The proceeding could
5 have resulted in our claims being impaired or
6 unimpaired. And you don't know that until the
7 end, but that doesn't -- the -- the language of
8 1109(b) speaks to a creditor. So, if you're a
9 party in interest in the beginning with a right
10 to be heard under 1109(b), then you're a party
11 in interest all the way through --

12 CHIEF JUSTICE ROBERTS: What if --

13 MS. HO: -- Justice Thomas.

14 CHIEF JUSTICE ROBERT: I -- I -- I
15 know there's -- we could have some back and
16 forth about the facts, but in a hypothetical,
17 let's assume that your client, whichever plan --
18 you know, there's three different plans on the
19 table, and under every one, your client gets --
20 you know, his exposure is exactly the same. It
21 makes no difference to him which particular
22 creditors are going to get what. He's -- just
23 given the factual situation, he's going to walk
24 away with exactly what he has or what he doesn't
25 have when it's all done.

1 In what sense does he have an interest
2 in how his assets are distributed or -- or what
3 the liabilities are? In other words, although
4 he is -- you could identify where he is going
5 to, you know, be on the hook or not on the hook,
6 but at the end of the day, everybody agrees it's
7 not going to make any difference.

8 Now does he get -- still get to
9 participate because his assets are going to be
10 used in some form or another?

11 MS. HO: Yes, Your Honor. And this
12 goes -- Mr. Chief Justice, this goes to, I
13 think, the colloquy I was having with Justice
14 Thomas about the importance of the ex ante
15 determination of who a party in interest is,
16 right? It's somebody who could be directly and
17 adversely affected. And I think one may --

18 CHIEF JUSTICE ROBERTS: Well, under my
19 hypothetical, he -- he's going -- I guess my
20 hypothetical, he's going to be adversely
21 affected to exactly the same extent or not
22 affected at all.

23 MS. HO: I think, as long as -- as --
24 as -- as -- as in the course of the case that --
25 that entity is directly and adversely affected,

1 and I think one -- one way that we know that,
2 Mr. Chief Justice, is because, if you look at
3 1109(b), one of the entities that's expressly
4 listed is a creditor.

5 And we also know that different
6 provisions of the code, it matters whether you
7 are impaired or unimpaired, right? So, in other
8 words, you don't get a vote on a plan if your
9 interests are not impaired.

10 CHIEF JUSTICE ROBERTS: Yeah, and we
11 also know --

12 MS. HO: But that is different than
13 being heard, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Yeah. We also
15 know that in these proceedings, there are some
16 creditors that are just not going to get
17 anything because of their particular status and
18 all that. Now I suppose you want to say these
19 -- technically, under the rule, he can go in,
20 and maybe that's a difference in this case. But
21 is -- is a party in interest, is the same test
22 for that Article III?

23 MS. HO: That's our position. Our --
24 our position, which is the position adopted by
25 the Third Circuit, is that the test for that is

1 Article III, which -- which --

2 CHIEF JUSTICE ROBERTS: Well, under
3 Article III, if you're not going to be injured
4 at all because the proceedings -- you know
5 you're not going to get any money or you know
6 you're not going to have any left or whatever it
7 is, I don't know that that would satisfy Article
8 III just because people are going to be fighting
9 about who gets your money. But the one thing
10 that's clear, it's not going to be you.

11 MS. HO: Well, I think, though, you
12 don't know that. You don't know that at the
13 outset of -- of -- of -- of -- of the
14 proceeding, right? So a creditor does not know,
15 a party in interest or an equity holder does not
16 know, and even the debtor doesn't know --

17 CHIEF JUSTICE ROBERTS: Okay. Well,
18 that, I think, is --

19 MS. HO: -- until the very end.

20 CHIEF JUSTICE ROBERTS: -- is fighting
21 my hypothetical. And, you know, maybe it's not
22 a good hypothetical, but assume that that is the
23 fact, that -- that they're not going to be
24 affected one way or another. They're just so
25 far down the line of, you know, people who can

1 recover or so far down the line of people who
2 are responsible that they're really not going to
3 get anything else.

4 MS. HO: I do hate to fight your
5 hypothetical, Mr. Chief Justice, but I -- I -- I
6 do think such a person -- I think it's -- I
7 guess maybe I'm fighting it because it's hard to
8 know, it's maybe impossible to know at the
9 outset of any proceeding whose ox is going to be
10 gored and -- and how much. That is very much an
11 open question.

12 That -- that is why Congress, in
13 1109(b), spread -- spread a -- set a big table
14 so that all parties in interest can come and
15 participate and be heard and work -- work out
16 the negotiation among the parties who have a
17 stake, who could be directly --

18 JUSTICE KAGAN: I guess I'm --

19 MS. HO: -- affected by the --

20 JUSTICE KAGAN: -- I'm not sure, Ms.
21 Ho, how your "at the outset" rule fits with your
22 Article III rule --

23 MS. HO: Mm-hmm.

24 JUSTICE KAGAN: -- because, as -- as
25 you just suggested, at the outset, there's going

1 to be a lot of things you don't know. You don't
2 know what the plan is going to be. You don't
3 know whether the plan is going to affect you,
4 injure you or not. You don't know -- you know,
5 all the things that we think of in the standing
6 context: Is there imminent injury? Is there
7 some traceability? At the outset, many people
8 won't have the answers to those questions.

9 So I guess I can understand an "at the
10 outset" rule, and I can understand an Article
11 III rule, but I'm not sure I can understand both
12 of them together.

13 MS. HO: Sure. Two points to that,
14 Justice Kagan.

15 To start, you know, we -- we do think
16 that party in interest is coextensive with
17 Article III, but you -- you wouldn't -- you
18 wouldn't have to agree with me on that to agree
19 in terms of what -- who a party in interest is
20 under -- under the statute.

21 But, secondly, I -- I do think there
22 is a good fit --

23 JUSTICE KAGAN: So your first answer
24 is you're willing to give up the Article III?

25 MS. HO: Well, I don't think my -- I

1 just wanted to make clear, Your Honor, I don't
2 think -- you don't have to agree with me --

3 JUSTICE KAGAN: Yeah. That's --
4 that's a fine answer.

5 MS. HO: -- on -- on -- on -- on
6 Article III. We do think it's -- it is -- it is
7 coextensive, as the Third Circuit has held for a
8 dozen years, and I don't -- I don't think
9 there's any tension between that and ex-ante.

10 I think the way to think about it is
11 it's -- it's -- it's basically do you have
12 standing and does disaggregating that from the
13 merits, right, what a plan will actually do or
14 how the proceeding will actually unfold.

15 In the same way that this Court, you
16 know, doesn't let the standing inquiry determine
17 the merits, I think this -- it operates the same
18 way in 1109(b) in the party in interest
19 discussion and analysis, is that you're looking
20 to see could -- could these proceedings directly
21 and adversely affect it.

22 I think, as to traceability and
23 redressability, I think those -- those
24 requirements of Article III will virtually
25 always be satisfied in -- in every case where

1 there's a party in interest, right?

2 JUSTICE SOTOMAYOR: Can we -- can I --

3 MS. HO: Yes, Justice Sotomayor.

4 JUSTICE SOTOMAYOR: -- break this
5 down?

6 There are various points at which you
7 decide standing. One is at the beginning of the
8 suit. And I think this is not an Article III
9 court. This is an Article II court. And it's
10 not even a full court because it can't do
11 everything an Article III court can do.

12 It's closer, not quite, to an
13 administrative proceeding. But it's an Article
14 II court. And, generally, a party in interest
15 is anyone that could be affected by a plan. The
16 plan hasn't come into effect, but you could
17 posit a thousand different ways that a plan
18 could directly financially injure someone.

19 The Chief is positing a case where
20 there's just not enough money, they're never
21 going to reach down here, but you don't know
22 that because you don't know what claims are
23 going to be disallowed, whether some priority
24 claims are not going to be accepted. There's
25 just too -- that's what you're saying about the

1 unknown?

2 MS. HO: Yes.

3 JUSTICE SOTOMAYOR: Now the question
4 becomes when you get to the point that a plan --
5 and this is the point we're at -- when we get to
6 the point that a plan is in place, now the
7 question is who can object to that plan,
8 correct? And now the question becomes what are
9 the reasons you can object?

10 And you're saying, because this plan
11 as structured not only violates the terms of our
12 contract, it also violates the terms of the
13 bankruptcy court. You're saying that there's a
14 separate good faith and fair dealing, an equal
15 treatment requirement under the Bankruptcy Code
16 and that this plan violated that, correct?

17 MS. HO: Correct, Your Honor.

18 JUSTICE SOTOMAYOR: Now the net -- the
19 net neutrality test doesn't answer that second
20 question, correct?

21 MS. HO: Correct.

22 JUSTICE SOTOMAYOR: Because whether or
23 not, if this plan in some way has treated you
24 differently from the Debtors' other debts with
25 no reasonable basis to do so, that could breach

1 the Bankruptcy Code, good faith and fair
2 dealing, correct?

3 MS. HO: Correct.

4 JUSTICE SOTOMAYOR: All right. So now
5 it's possible after we go through all of this
6 that the court below will say: No, it doesn't
7 breach it, but you have a right to be heard on
8 that. That's what you're saying. That's the
9 standing, correct?

10 MS. HO: Yes, yes.

11 JUSTICE SOTOMAYOR: So that's the
12 difference between you can't flip things and get
13 to the merits in that way, you have to look at
14 that standing issue on the basis of the moment
15 the plan is there, I am being affected by the
16 plan.

17 It's possible that that effect won't
18 rise to the level of something that I will be
19 given something to, but I have a right for them
20 to hear me out on this, correct?

21 MS. HO: Correct.

22 JUSTICE JACKSON: Can I ask you about
23 the difference between your view and the
24 government's view? I understood the
25 government's view to be narrower but that you

1 would also be covered by it.

2 So do you reject their sort of
3 contract-based determination here?

4 MS. HO: No, not at all, Justice
5 Jackson. And I -- I -- I don't see the
6 government's position as -- as a different -- as
7 a different test. I --

8 JUSTICE JACKSON: Do you agree it's
9 narrower than yours?

10 MS. HO: I think I -- I think I would.
11 I think I would agree that it's -- that it's
12 narrower.

13 JUSTICE JACKSON: So why is yours
14 better?

15 MS. HO: I actually don't know that --
16 that one is -- is -- is -- is better or the
17 other. I think what the government is saying is
18 we -- we both agree that 1109(b), that the text
19 is broad and expansive.

20 JUSTICE JACKSON: Right.

21 MS. HO: We -- we -- we both agree
22 that we are -- we are a creditor --

23 JUSTICE JACKSON: Right.

24 MS. HO: -- and that we were entitled
25 to be heard that way.

1 JUSTICE JACKSON: But setting aside
2 the --

3 MS. HO: And I think -- I think the
4 government's position is they're focusing on the
5 -- anyone who holds an executory contract.
6 And -- and we do.

7 JUSTICE JACKSON: Right.

8 MS. HO: So that -- that -- that
9 brings us -- that brings us in. So I don't -- I
10 don't see that as --

11 JUSTICE JACKSON: I guess what I'm
12 worried about a little bit --

13 MS. HO: Yes.

14 JUSTICE JACKSON: -- is that if we go
15 beyond people who hold a contract and just to
16 anyone who's adversely affected, I guess you
17 could imagine that a competitor in this
18 environment would say, I'm adversely affected,
19 you know, by what is happening with the
20 bankruptcy of this other business.

21 Would -- would we be opening the door
22 to allowing in the kinds of entities on the
23 basis of your broad test that you would
24 otherwise think Congress would not have wanted
25 to be a party in interest?

1 MS. HO: No, Your Honor. And --
2 and -- and to be clear, we are -- we are more
3 than happy to embrace a holding of this Court
4 that we are a party in interest who can be heard
5 on any issue because of the insurance contract
6 that we hold. So I want to be clear on that.

7 But I think, to your point about
8 the -- the floodgates argument that my friends
9 raise, I don't think so, because I think the
10 direct and adverse test which we believe is
11 coextensive with Article III, it -- it has
12 teeth. Again, it has been the rule in the
13 Twelfth Circuit for over a dozen years. And I
14 -- I -- my friends on the other side really
15 can't point to any sort of chaos that has
16 resulted from it.

17 So I -- I think our -- our test has
18 teeth. And I -- and I also think that Congress,
19 again, as I started by saying, I think the
20 breadth is -- is a feature and not a bug here,
21 that Congress wanted to bring stakeholders to
22 the table, parties in interest who had a stake.
23 And if anyone -- if anyone has a stake in this
24 Chapter 11 proceeding, it is the insurer who
25 will be paying the vast bulk of claims --

1 JUSTICE KAVANAUGH: Isn't that --

2 MS. HO: -- against the Debtors.

3 JUSTICE KAVANAUGH: This doesn't hurt
4 your argument, but isn't it true that the
5 insurer will, who's responsible for the claims,
6 will always or almost always be a party in
7 interest then in bankruptcies --

8 MS. HO: I -- I --

9 JUSTICE KAVANAUGH: -- mass tort
10 bankruptcies?

11 MS. HO: I -- I -- I think that's -- I
12 think that's right. And when -- when I sort of
13 think through my -- to myself, you know, what --
14 who -- who else could be brought in under our
15 test, I -- I -- I do think the -- the single
16 largest group are the -- are -- are insurers and
17 who will also often come in as creditors as
18 well, as -- as we do -- as we do too.

19 JUSTICE GORSUCH: Counsel, just on the
20 Article III point, I wonder whether we need to
21 tangle or should tangle with it because I think
22 of Article III as the -- the plaintiff coming to
23 court has to establish an injury.

24 And -- and who the plaintiff is in a
25 bankruptcy case, I don't know, maybe the

1 petitioner, right, but normally we say someone
2 objecting to relief under Bond, under Clapper,
3 doesn't have to establish Article III standing.
4 And that would seem to be a closer fit to a
5 party or a group like yours seeking to object to
6 a plan.

7 MS. HO: I certainly don't disagree
8 that in -- in -- in the context where what you
9 have is someone who is only objecting, right, to
10 the relief being sought, and -- and that is us
11 to a T, right? We are -- we are objecting to
12 the plan.

13 I think there may be a different issue
14 raised when you get to, say, appellate standing,
15 but -- but in terms of 1109(b) party in
16 interest, we -- we do -- we do agree that as we
17 are -- we are opposing through -- yes, thank
18 you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: I'm assuming if we
24 reach it on the government's theory or in your
25 theory, that directly and adversely means an

1 insured, because they have a contract --

2 MS. HO: Yes.

3 JUSTICE SOTOMAYOR: -- is a party in
4 interest --

5 MS. HO: Yes.

6 JUSTICE SOTOMAYOR: -- that should be
7 heard, that we don't have to reach the creditor
8 issue or the Article III issue?

9 MS. HO: That's correct, Your Honor.

10 JUSTICE SOTOMAYOR: Okay.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?
12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 JUSTICE BARRETT: Well, let's see.

16 It -- it seems to me that maybe we would have to
17 at least say Article III doesn't apply because
18 you're not -- because someone like the insurer
19 is not the one invoking it.

20 I guess I'm -- I would be a little bit
21 worried, as you say, if Congress is setting the
22 table broadly and parties in interest cut
23 broadly, it's speculative, right? I mean, it --
24 it's pretty speculative.

25 You might be able to articulate a way

1 that the plan could adversely affect your
2 interests, but it would be speculative. And so
3 maybe we don't have to say whether Article III
4 applies in Article I courts, but if I think you
5 might have a problem satisfying Article III, I
6 think I would still have to say you have
7 statutory standing, right?

8 MS. HO: Yes. I -- I think there's no
9 -- there -- I don't believe there's any dispute
10 that we have Article III standing here and in
11 the court below because we weren't heard, and so
12 we're challenging that we -- we were not -- were
13 not heard.

14 JUSTICE BARRETT: Yes.

15 MS. HO: I do think, in terms of the
16 Article III issue, the Fourth Circuit did
17 address our creditor issue in Article III terms,
18 but I think what that court was really doing was
19 it was reading any issue out of the statute.

20 So I think from this Court's
21 perspective, I don't think there's any question
22 about our Article III status. I think the
23 question is, are we a party in interest? We --
24 we say --

25 JUSTICE BARRETT: Right.

1 MS. HO: -- that's directly and
2 adversely affected. The government says it's
3 because we have an executory contract. Either
4 way, I think we -- we satisfy the statutory
5 standing and we also satisfy Article III
6 standing here.

7 JUSTICE BARRETT: Oh, I see what
8 you're -- I mean, I get what you're saying. I'm
9 just saying, if I don't want your test, if I
10 don't want to say that the statutory standard is
11 coextensive with Article III --

12 MS. HO: Yes.

13 JUSTICE BARRETT: -- that's -- that's
14 the issue that I might have.

15 And then just very briefly, could you
16 describe for me for the uninsured claims what
17 exactly -- I mean, you know, the -- you know,
18 Kaiser and the -- the Claimants are fighting
19 pretty hard to keep the insured claimants out.

20 So what exactly are the fraud
21 protection measures that would apply to the
22 uninsured claims, the ones that you want to
23 apply to the insured claims as well?

24 MS. HO: Sure. There are essentially
25 two, Justice Barrett. The first would require

1 all claimants to disclose all known exposures --

2 JUSTICE BARRETT: Right.

3 MS. HO: -- right, to all defendants.

4 And the second primary requirement or
5 measure would be a release that would allow the
6 trust to obtain information from the other
7 trusts on that.

8 JUSTICE BARRETT: Okay. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 Thank you, counsel.

12 MS. HO: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Yang.

14 ORAL ARGUMENT OF ANTHONY A. YANG
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONER

17 MR. YANG: Mr. Chief Just -- Mr. Chief
18 Justice, and may it please the Court:

19 Both counterparties to executory
20 contracts and creditors are parties in interest
21 that may be -- appear and be heard on any issue
22 in a Chapter 11 bankruptcy case. If a party is
23 a party in interest, they get a seat at the
24 reorganization table, and once they're at the
25 table, they can be heard on any issue in the

1 case. And that status must be determined ex
2 ante, that is, before the court considers the
3 question, because the right is to be heard in
4 advance.

5 That doesn't depend on the merits of
6 the position, and it cannot be determined based
7 on what a plan proposes because a party in
8 interest under 1121(c) can itself propose a
9 plan. Moreover, the plan is never final until
10 all appellate proceedings have -- on the
11 confirmation are ended. And so they can
12 participate all the way through.

13 The code contemplates that every
14 executory contract must either be assumed or
15 rejected. Either way -- and I'd like to develop
16 that in our conversation -- but either way, a
17 party -- a counterparty is a party in interest.

18 I'd be happy to -- to follow up on
19 that.

20 JUSTICE THOMAS: Mr. Yang, what's the
21 difference between your view and -- or your
22 approach to 1109 and Petitioner's?

23 MR. YANG: Well, I think Petitioner's
24 view, while -- it appears to me that they are
25 interpreting "party in interest" based on some

1 older Interstate Commerce Act cases that
2 borrowed some Article III concepts when
3 interpreting "party in interest."

4 We just don't think that's a term of
5 art. It's not clear to me that they actually
6 say that you have to have Article III standing
7 to raise an objection. I think it's more based
8 on the term, and the -- the Article III ideas
9 were incorporated by reference to the cases.

10 So I'm not sure we disagree about
11 Article III. We just disagree about the
12 interpretive method. Our interpretive method
13 just goes to the text. The text is broad. It's
14 not so broad as to get amici or, you know,
15 people with very tangential views in the case.

16 But, in this case, it certainly
17 applies expressly to creditors, and we say -- we
18 think it applies to parties with executory
19 contracts because, remember, executory contracts
20 under 365 are either going to be assumed
21 affirmatively or rejected, and if assumed,
22 sometimes they're assigned to somebody else.

23 Now, if the debtor seeks to assume a
24 contract, they have to satisfy Section 365's
25 standards that protect the counterparty. If

1 there has been some kind of breach, it has to be
2 cured. Certain contracts cannot be assumed.
3 And the counterparty can object. Among other
4 things, the counterparty has an interest in the
5 debtor's ability to fulfill that contract going
6 forward. And the debtor has to move to assume a
7 contract. It has to show that the business
8 judgment standard has been met. A counterparty
9 can object.

10 Now, if the debtor wants to reject the
11 contract -- Justice Kagan, your -- your opinion
12 in Mission Products Holdings addresses this --
13 that results in a breach of contract. It
14 results in a claim, and then the creditor is a
15 claimant and not in a real good position because
16 it's usually a pre-petition plain -- claim, and
17 you get pennies on the dollar in most contexts.

18 Either way, assumed or rejected, they
19 have an interest. Now that's reflected not only
20 --

21 JUSTICE KAGAN: Mr. Yang, in an -- in
22 an old case of ours, we used the term "adversely
23 and directly affected." Do you accept that
24 standard, or do you think we should not have a
25 standard like that?

1 MR. YANG: You know, I'm not really
2 sure where that standard comes from except
3 unless you are drawing from Article III. We
4 don't really object, I think, to the outcome of
5 having some direct effect. Whether you're
6 adversely affected, though, you don't -- I think
7 it's the wrong question.

8 You have to have the potential to be
9 adversely affected in a bankruptcy because
10 that's what the reorganization is. You bring
11 everybody in who has a potential to be affected
12 and you work it out.

13 So going back to the pre-code
14 Bankruptcy Act, and --

15 JUSTICE KAGAN: And -- sorry.

16 MR. YANG: Sure.

17 JUSTICE KAGAN: If I could just follow
18 up. You -- you too -- and this is just like Ms.
19 Ho -- said at the outset this is --

20 MR. YANG: Yeah.

21 JUSTICE KAGAN: What if you don't
22 really know whether your -- you have any
23 interest in this until the middle of the thing?
24 I mean, I can imagine many -- many events taking
25 place, including there's now a plan on the table

1 and now you look at the plan on the table and
2 you think: Oh, my gosh, I could be affected.

3 It just seems a strange thing in a
4 bankruptcy proceeding, which is fluid and has
5 many twists and turns, that you would say do
6 this at the outset and -- and apparently only at
7 the outset.

8 MR. YANG: Let me answer that, and I
9 think it's easiest to answer it in the context
10 of executory contracts and creditors, right?
11 Executory contracts, they're always going to
12 have potentially some effect. Maybe you just,
13 you know, don't know what the effect is going to
14 be, and a lot of people who could be parties in
15 interest, just because it doesn't fit into the
16 -- it doesn't make rational economic sense, they
17 don't participate, right? They just don't
18 participate until -- they have a right to, but
19 they don't until it becomes relevant.

20 The pre-Bankruptcy Act -- Code Act
21 labels executory contractors as parties in
22 interest. Why? It's because they had to get
23 advance notice of rejection. And there's a case
24 called King versus Barrett in the Tenth Circuit,
25 1973, it explains that you give them notice in a

1 hearing so they can be heard.

2 Currently, the current code says that
3 the counterparty can seek an order to set a
4 period to assume or reject. That's 365(d)(2).
5 Other parties in interest may similarly set that
6 same period, but they can only do so in the
7 context of status conferences. That's
8 105(d)(2)(A). All of this is showing that
9 parties in interest -- that -- that executory
10 counter -- contract counterparties are parties
11 in interest.

12 Now there's a few things that I'd like
13 to address. One is there's a question about
14 having a voice and not a vote. I think that
15 goes to the question of being impaired.
16 Impaired is what the plan under Section 1124
17 proposes. But there are other requirements for
18 a plan. For instance, a plan needs to be
19 feasible. So, if you're a creditor and the plan
20 proposes satisfying everything, but it satisfies
21 it in a way that's not likely to end up being
22 implemented, you can object under 1129(a), I
23 think it's (a)(11), that the plan's not
24 feasible.

25 So the impairment just talks about the

1 separate requirement that the classes vote. It
2 doesn't address your right to be heard, which,
3 by the way, is not only a right to be heard to
4 object, but it's a right to be heard to support
5 the plan, right? If you're not impaired, you
6 may well want to come in and support the plan.

7 The floodgates question, it largely
8 turns, I think, on the question of any issue,
9 not the problem of party in interest. Like
10 take, for instance, the vending contractor that
11 -- that everyone's talking about. The problem
12 is not that a vending contractor gets to come in
13 and be a party in interest and participate with
14 respect to the vending contract, whether it's
15 assumed or rejected or interpreted in a way it
16 doesn't like. The concern is that it's also
17 heard on any issue.

18 But the text of 1109(b) and its
19 history, the evolution of expanding those groups
20 that can speak on any issue, foreclose any real
21 textual ability to say, oh, you can only
22 participate on certain issues. "Any issue"
23 means what it says.

24 Secondly, the concerns about
25 floodgates, I think, are totally overstated.

1 Litigants make rational economic choices where
2 they have a stake in reasonable arguments. The
3 right to be heard doesn't impose on the court
4 any burden to -- to speak at length if it
5 doesn't think there's much to say about the
6 issue.

7 And the court has to decide the
8 question anyway in terms of confirmation because
9 this Court, in United Student Aid Funds,
10 determined that the court has to decide whether
11 the plan complies with the code even if no one
12 objects.

13 And, finally, sanctions deters any
14 kind of bad-faith conduct. Ultimately, this is
15 a balancing question, does it make sense to
16 bring everybody in, we're going to weigh it
17 against maybe some burden of having their voices
18 heard, we're going to balance it against the
19 waste of resources of trying to decide who gets
20 to be heard, and Congress struck that choice in
21 1109(b).

22 JUSTICE KAVANAUGH: Does your position
23 just boil down to the common-sense point that an
24 insurer is on the hook for the claims in a mass
25 tort bankruptcy as a party in interest?

1 MR. YANG: I think that's a subset of
2 our point, and our -- our -- our primary point
3 is --

4 JUSTICE KAVANAUGH: Well, all -- all
5 we need is that subset. I mean, isn't that just
6 kind of common -- I just thought that is the
7 common-sense point.

8 MR. YANG: I agree. But I actually
9 don't think it's that much different than saying
10 that a counterparty to an executory contract is
11 always going to have an interest.

12 JUSTICE JACKSON: Mr. Yang?

13 MR. YANG: I just don't think that
14 that's different. And the idea was that
15 Congress --- the legislative history reflects
16 that the idea here is to hear all sides of an
17 issue and then let the court decide.

18 JUSTICE JACKSON: Mr. Yang --

19 JUSTICE KAVANAUGH: And the insurer is
20 kind of obvious, right? That's your point.

21 MR. YANG: Insurer's an obvious one.
22 I mean, it -- it -- but it would have included
23 even the vending contractor. Now the vending
24 contractor might not have participated? Why?
25 Because, you know what, it didn't matter. It's

1 like small steaks, potatoes. The vending
2 contractor is just not going to participate.

3 There's a lot of people in the
4 periphery that just don't participate. The 10
5 cent creditor, unimpaired, unsecured 10 cent
6 creditor is expressly a party in interest,
7 right?

8 JUSTICE JACKSON: What about an
9 employee? You know, if we're going with your
10 definition, which has to do with contracts --

11 MR. YANG: Yep.

12 JUSTICE JACKSON: -- I suppose an
13 employee has a contract, so are you saying that
14 they would be a party in interest?

15 MR. YANG: An -- an employee can be a
16 party in interest as a party to an executory
17 contract. Now there are certain code provisions
18 that deal with employees and unions and things
19 like that, but as a general matter, yes.

20 JUSTICE JACKSON: Okay.

21 MR. YANG: That's true.

22 JUSTICE JACKSON: And just in response
23 to Justice Kagan, I -- I guess I didn't
24 understand you to be making a statement that the
25 parties couldn't be recognized on a rolling

1 basis, right? Like, if someone determines or
2 decides in the middle of it that they have an
3 interest, they can ask to come in?

4 MR. YANG: Yes. But --

5 JUSTICE JACKSON: Is that right?

6 MR. YANG: Yes, I think that's true.
7 The -- the -- the reality is is they've always
8 had the interest to be potentially affected.
9 They might not have realized it --

10 JUSTICE JACKSON: Right.

11 MR. YANG: -- until later --

12 CHIEF JUSTICE ROBERTS: Thank -- thank
13 --

14 MR. YANG: -- but, when they realize
15 it, they come in and, you know, they are given a
16 right to be heard.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. YANG: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Your -- in your
24 brief, you say this case presents no occasion
25 for the Court to determine the phrase -- the

1 phrase's outermost -- party in interest's
2 outermost boundaries. And you repeat that
3 today, that we should just say clearly insurers
4 or people with executory contracts, et cetera.

5 But don't we have to say a little bit
6 more? Don't -- don't we have to say something
7 like directly and adversely affected to -- to
8 quantify --

9 MR. YANG: I'm not sure --

10 JUSTICE SOTOMAYOR: -- to take away
11 the employee who doesn't -- who doesn't have a
12 contract with the Debtor, but the employee who
13 has a contract with the Petitioner, Truck?

14 Could he sue and say my salaries and
15 benefits are going to go down because this
16 doesn't have an anti-fraud provision and the
17 company's going to lose more money?

18 MR. YANG: Well, I don't --

19 JUSTICE SOTOMAYOR: So I'm going to
20 make less?

21 MR. YANG: The Court might well want
22 to say more. The Court -- but the Court
23 certainly doesn't have to to resolve the issue
24 with respect to whether Truck is a party in
25 interest.

1 Now, if the Court wanted to explore
2 the text of party in interest more, I think what
3 I would suggest is that the Court can explain
4 that a party is a participant on one or -- one
5 of the sides of an action or an affair.

6 It's not a person in interest. It's a
7 party in interest. And context matters here.
8 Bankruptcies are aggregations of individual
9 controversies, and the participants there have
10 an interest in the proceedings' exercise of
11 jurisdiction over the debtor's property and the
12 distribution.

13 If the proceeding has a potential to
14 affect their interests, and it's not necessarily
15 an interest in the entitlement to specific
16 debtor properties, if the proceeding has the
17 potential to affect their interests, that is
18 enough to be a party in interest.

19 Now things that I think you're talking
20 about kind of two orders of steps out have never
21 been thought to be people who can come in with
22 an interest. And -- and you --

23 JUSTICE SOTOMAYOR: But -- but how do
24 I --

25 MR. YANG: Right.

1 JUSTICE SOTOMAYOR: I love asking this
2 question. How do I write this so that there is
3 a difference between that employee and the truck
4 company? I can write it to say the truck
5 company because it's affected, but what -- but I
6 have to say something more to take care of those
7 two and three down.

8 MR. YANG: The employee of Truck?

9 JUSTICE SOTOMAYOR: Yeah.

10 MR. YANG: Well, certainly, the Court
11 would have to decide how far it wants to go. I
12 don't think you have to decide employees of
13 Truck since the question before the Court is not
14 employees of Truck.

15 But, if you wanted to, we don't object
16 to the idea that the participants that have an
17 interest in the proceeding have always been
18 those that have a direct kind of not attenuated
19 effect. It's not amici. It's not some law
20 professor. It's not employees of somebody else.
21 It's someone with a more direct effect.

22 I don't think that derives from
23 Article III, but I think you can derive it from
24 kind of looking more generally at -- at
25 bankruptcy practice.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?
4 Justice Barrett?
5 Justice Jackson?
6 Okay. Thank you, counsel.

7 MR. YANG: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Mr. Marshall.

9 ORAL ARGUMENT OF C. KEVIN MARSHALL
10 FOR THE DEBTOR RESPONDENTS

11 MR. MARSHALL: Mr. Chief Justice, and
12 may it please the Court:

13 A party in interest is someone who has
14 a legal interest in a debtor's bankruptcy
15 estate, its property, not someone who is merely
16 concerned about the debtor's bankruptcy more
17 generally.

18 The list of parties in interest in
19 Section 1109(b) shows this. Settled usage of
20 the term in bankruptcy confirms it. And the
21 government, at least in its brief, agrees with
22 it.

23 At the outset of the case, the parties
24 in interest will ordinarily be the debtor with
25 its creditors and shareholders, those whom

1 Section 1109(b) lists.

2 Others, as Justice Thomas was asking
3 about, may come to have an interest in the
4 estate and, thus, can show that the bankruptcy
5 will directly affect their rights or
6 obligations. For example, if a plan would
7 breach an insurer's policy, altering its
8 contract rights or obligations, then it would
9 become a party in interest.

10 But, if a plan preserves the insurer's
11 status quo, it is insurance neutral, in that
12 case, the insurer is not a party in interest and
13 it has no right to object to plan confirmation.

14 Here, the plan does not alter Truck's
15 contract rights or obligations. It breaches
16 nothing. It does not do anything to put Truck
17 on the hook. That is what the lower courts
18 uniformly found, and Truck here does not
19 challenge that finding. Truck, therefore, has
20 no right to challenge plan confirmation.

21 Truck invokes policy concerns that
22 would supplant this settled clear rule with a
23 novel expansive framework that would give
24 insurers greater rights to challenge plan
25 confirmation than even a creditor has. But

1 bankruptcy law already addresses these concerns
2 by allowing interested entities that are not
3 parties in interest to pursue permissive
4 intervention. Truck simply ignores that tool.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Marshall, at the
7 beginning, at the outset of these proceedings,
8 bankruptcy proceedings, Truck was a creditor and
9 Truck certainly from its vantage point was a
10 party in interest because of the -- being the
11 one insurer for all the claims or many of the
12 claims here.

13 So do you think we should look at the
14 filing period as the point to determine party of
15 interest, or should we do it at a later point?

16 It would seem that you can't do
17 insurance neutrality at the beginning. I don't
18 know how you would do that.

19 MR. MARSHALL: If one is in the list
20 of entities in Section 1109(b), it's possible to
21 answer that question at the outset.

22 JUSTICE THOMAS: So they would be a
23 creditor?

24 MR. MARSHALL: They were -- they were
25 a creditor, yes, but as to their status as an

1 insurer, the question is, do they have an
2 interest in the debtor's bankruptcy estate? And
3 at the outset of the case, it was obviously a
4 no, but then, when a plan is submitted and they
5 want to claim that that would breach their
6 policy rights and give them interest in the
7 estate, then that would be the point at which --

8 JUSTICE THOMAS: Well, let me --

9 MR. MARSHALL: -- the threshold
10 question would need to be decided.

11 JUSTICE THOMAS: Well, let me -- let's
12 go back a second.

13 As a creditor, at the beginning, if
14 they are considered a party in interest, can
15 they raise any issue in the proceedings?

16 MR. MARSHALL: Under 1109(b), they
17 generally can. In the context of a plan
18 confirmation, if they're unimpaired, they don't
19 have the right to object.

20 JUSTICE KAVANAUGH: Isn't it just
21 common sense that an insurer at the outset is
22 going to have an interest in this because how
23 much the insurer will have to pay will be
24 affected by how the plan is structured?

25 MR. MARSHALL: Justice Kavanaugh, they

1 could be interested in the general sense of
2 being concerned, which is the phrase Truck
3 tended to use.

4 JUSTICE KAVANAUGH: No, not just
5 concerned but how much they owe -- how much
6 they're going to have to pay. It's not just I'm
7 concerned about things. How much I'm going to
8 have to pay.

9 MR. MARSHALL: And so then the
10 question is, at what point do they come to have
11 an interest in the estate? And if a plan is
12 proposed that would -- that in their view would
13 breach their policy, they certainly have the
14 right to be heard on whether it would, in fact,
15 breach their policy rights, and they were heard
16 here.

17 And the courts, all the courts, all
18 three lower courts held their policy rights were
19 not breached. And so there's nothing about the
20 bankruptcy case that puts the insurer on the
21 hook. That can happen in cases. It happened in
22 a Ninth Circuit case that's in the briefs.

23 And if -- if the plan actually --

24 JUSTICE KAVANAUGH: But -- you're
25 saying put them on the hook, but for how much

1 they're going to be on the hook, that will be
2 affected, right?

3 MR. MARSHALL: I'm not sure I followed
4 that. Nothing about the bankruptcy case changes
5 Truck's position. If the bankruptcy case were
6 to -- to change an insurer's position, it would
7 be a party in interest and have a right to
8 object to the plan.

9 JUSTICE JACKSON: But isn't --

10 JUSTICE KAVANAUGH: But they want the
11 fraud prevention provisions. What's your
12 response to that as -- as, you know, their
13 interest in having those established?

14 MR. MARSHALL: There's a threshold
15 question whether they are a party in interest or
16 not, and that depends on whether they have an
17 interest in the bankruptcy estate. If they are
18 a party in interest, then they would have the
19 right to come in and raise the issues of
20 concern, including the fraud prevention
21 measures.

22 But it's a threshold question.
23 Perhaps it's helpful to think of an analogy. A
24 creditor, as we were discussing with Justice
25 Thomas, has a right to raise any issue under

1 1109(b), but there's a threshold question
2 whether you actually are a creditor. So you can
3 come in and you can say you're a creditor. You
4 don't actually have to move to intervene. And a
5 court -- if somebody challenges that, then the
6 court has to decide, are you a creditor or not?
7 That's --

8 JUSTICE BARRETT: Why are you --

9 CHIEF JUSTICE ROBERTS: Well --

10 JUSTICE BARRETT: -- fighting this so
11 hard? Why -- why do you want Truck to not even
12 be heard? Just what is your motivation to be
13 fighting this so hard?

14 MR. MARSHALL: We have a deal with the
15 creditors. We think it's a valid deal and a
16 good deal, and we want to be done with
17 bankruptcy. And we don't -- Truck has -- Truck
18 is coming in to try to blow up the deal that we
19 have.

20 JUSTICE SOTOMAYOR: Can I stop you a
21 moment? I am looking at the brief of amici
22 American Prosperity Casualty Insurance, and on
23 page 15, they explain that once the plan is
24 approved, this plan, under your terms, it
25 obtains a discharge, the Debtor, and the

1 protection of a channeling injunction, now all
2 the claims are going to go through the trust and
3 not to you.

4 The Debtor has no ongoing incentive
5 after the plan is approved to limit the cost of
6 defending, paying claims, and any liability on
7 those claims. You lose it. That's the benefit
8 bankruptcy is giving you. And the Claimants,
9 their incentive for this plan is that they don't
10 want the anti-fraud provisions.

11 So who's protecting the insured? If
12 -- if the -- the insured can't protect itself
13 because you say it can't go to the bankruptcy
14 court, how is it being heard?

15 MR. MARSHALL: Nothing --

16 JUSTICE SOTOMAYOR: Because what
17 you're suggesting to us is that they don't have
18 a right to say the plan is violating a bunch of
19 other provisions of the code, 1129(a), or
20 permitting the differential treatment of -- of
21 -- of people who are owed money or of Claimants.
22 I mean, I -- I just don't understand your
23 argument.

24 MR. MARSHALL: They have --

25 JUSTICE SOTOMAYOR: I can argue that

1 the plan is breached, and once they say the
2 plan's not reached -- breached, I can't argue
3 that the plan violates the code? I've just
4 never heard of --

5 MR. MARSHALL: If --

6 JUSTICE SOTOMAYOR: -- parsing
7 standing in that way.

8 MR. MARSHALL: Justice Sotomayor, if
9 one is not a party in interest, there's no right
10 to raise issues. Party-in-interest status is a
11 threshold question.

12 And, here, as to Truck as an insurer,
13 they need to show they have an interest in the
14 bankruptcy estate to get in, to answer the
15 threshold question.

16 JUSTICE SOTOMAYOR: But they do.

17 MR. MARSHALL: And -- and to --

18 JUSTICE KAGAN: But I guess the
19 question --

20 MR. MARSHALL: -- to do that --

21 JUSTICE KAGAN: -- Mr. Marshall, is I
22 think what everybody is saying to you is, well,
23 they do have an interest in these anti-fraud
24 provisions. Not just a concern, they have an
25 interest, a material interest. If they get the

1 anti-fraud provisions, they're better off. If
2 they don't get the anti-fraud provisions,
3 they're worse off.

4 Now what I hear you saying back is
5 they had no preexisting entitlement to the
6 anti-fraud provisions, and your test is one that
7 says, if they're not being made worse off by the
8 plan, then they're not an interested party.

9 But I -- I don't know why that should
10 be the test. If I look at the language, that's
11 not the test. If I think about what the
12 ordinary meaning of being a party who's
13 interested is, that's not the test.

14 Why -- why is your test so long as
15 they're not being made worse off, they're not an
16 interested party?

17 MR. MARSHALL: Well, the test of
18 whether I -- there is a benefit I would like to
19 get out of the bankruptcy case, which is Truck's
20 test, is unlimited. Anytime you can imagine a
21 hypothetical plan that would be better off for
22 you --

23 JUSTICE KAGAN: Well, that's a
24 practical concern.

25 MR. MARSHALL: Well, it -- it --

1 JUSTICE KAGAN: And I think, you know,
2 the practical argument against it is it's pretty
3 costly to enter into these proceedings, and
4 nobody really does it unless they have a serious
5 interest, and, anyway, bankruptcy courts have
6 docket management techniques.

7 And, anyway, just putting aside the
8 practical concerns, is this a floodgates problem
9 or is it not a floodgates problem, I don't
10 really see why your test, which is are you being
11 made worse off or are you being made -- or is
12 it -- you know, are you just being held to the
13 bargain that you initially had, I don't see why
14 anybody would think that that's the way to
15 answer a question of whether you're interested
16 in a proceeding.

17 MR. MARSHALL: "Party in interest" is
18 a term of art that means you have an interest in
19 the debtor's bankruptcy estate. That's been the
20 meaning for a hundred years. And so that's the
21 way to start.

22 But, if we're going to think in terms
23 of seeking to obtain a benefit, in the context
24 of causes of action, Lexmark zone of interests,
25 the question is always, have you suffered a

1 loss? If you've suffered a loss, you come in
2 and you try to get a remedy.

3 What Truck is saying here is, I can
4 come in, even though I'm suffering no loss at
5 all to my legal rights, and just seek to obtain
6 a benefit because it's very nice that this
7 bankruptcy is here and maybe I can get something
8 out of it.

9 But even if they don't have the right
10 to come in, there's always permissive
11 intervention. So there's the right to -- to
12 come in as an interested entity that's not a
13 party in interest. The benefit of that is it's
14 in the discretion of the bankruptcy court. You
15 have to show cause. The bankruptcy court can
16 decide whether you come in for all issues or
17 just some.

18 The question is, who has the right to
19 intervene in the case? And it --

20 JUSTICE JACKSON: So --

21 JUSTICE KAVANAUGH: Would you object
22 to permissive intervention in a situation like
23 this where the insurer is seeking fraud
24 prevention?

25 MR. MARSHALL: We would have objected

1 to their attempt to come in and object to the
2 merits of the plan, but they certainly have the
3 right --

4 JUSTICE KAVANAUGH: That wasn't the
5 question.

6 MR. MARSHALL: Yeah.

7 JUSTICE KAVANAUGH: The question
8 was --

9 MR. MARSHALL: They -- they could have
10 sought to pursue inter- -- permissive
11 intervention under 2018 to get to the merits of
12 the plan.

13 JUSTICE KAVANAUGH: And would you have
14 objected to that?

15 MR. MARSHALL: We probably would have
16 opposed that.

17 JUSTICE KAVANAUGH: Why?

18 MR. MARSHALL: For all the reasons
19 that we're otherwise opposing.

20 JUSTICE KAVANAUGH: You just don't
21 want them to be heard.

22 MR. MARSHALL: We want -- they have
23 the right to be heard, to make a showing they
24 are --

25 JUSTICE KAVANAUGH: You don't want the

1 fraud prevention provisions, but you don't want
2 them to be heard on that. Is that -- I mean,
3 that's okay.

4 MR. MARSHALL: Well, the -- all the
5 lower courts --

6 JUSTICE KAVANAUGH: I just want --

7 MR. MARSHALL: I mean, they were heard
8 on that. All the lower courts ruled against
9 them on the merits as well, both the bankruptcy
10 and the district court, although the Fourth
11 Circuit didn't get to it.

12 It's good to keep in mind if we're
13 going to be talking about the policy concerns
14 that bankruptcy is just not about get everybody
15 to the table. It's also about having an
16 efficient and expeditious proceeding that makes
17 it possible to resolve what is ultimately a
18 question about the debtor and its creditors or,
19 in some cases, its shareholders.

20 CHIEF JUSTICE ROBERTS: Well --

21 JUSTICE JACKSON: Can I --

22 CHIEF JUSTICE ROBERTS: -- it may not
23 be about getting everybody at the table, but you
24 do want all the creditors there, don't you?

25 MR. MARSHALL: Yes, you do want all

1 the creditors there.

2 CHIEF JUSTICE ROBERTS: Well, they're
3 a creditor.

4 MR. MARSHALL: As to the plan that's
5 at issue here, they were an unimpaired creditor,
6 and an unimpaired creditor does not have the
7 right to object to a plan. That's Section
8 1126(f).

9 JUSTICE BARRETT: Mr. Marshall --

10 JUSTICE JACKSON: But at the time --

11 JUSTICE BARRETT: Mr. Marshall, the --
12 the language -- you agree that they had an
13 interest in the plan finding, right, about the
14 good faith and about whether this was going to
15 be collusive? Everybody said below that they
16 had an interest in the plan finding.

17 MR. MARSHALL: The plan finding was a
18 threshold question that they certainly had the
19 right to litigate.

20 JUSTICE BARRETT: Right. And they did
21 have an interest as a creditor because of the
22 deductibles that were due, right?

23 MR. MARSHALL: They were a creditor.
24 As to the plan at issue here, they were
25 unimpaired --

1 JUSTICE BARRETT: Okay. But --

2 MR. MARSHALL: -- and didn't have the
3 right to object.

4 JUSTICE BARRETT: -- that's looking
5 ahead to the plan. I guess what I want to say
6 is that 1109(b) says that "a party in interest,"
7 including our list, "may be heard on any issue"
8 in a case under this chapter. So, if they can
9 be heard on the plan finding or if they're a
10 creditor, I guess I don't understand why, on the
11 text of that provision, they could be so limited
12 and say, well, you can't bring up anything else,
13 even though the text says "any issue." It
14 doesn't limit it in that way.

15 MR. MARSHALL: I'll address that in
16 two respects. So the plan finding, again, is
17 the question of whether they are a party in
18 interest in the first place. It's a threshold
19 question. It's like deciding jurisdiction or
20 statutory standing. And you have to get through
21 that to get to the merits.

22 So, as an insurer, nothing about the
23 plan finding changes whether or not Truck is a
24 party in interest. They're not. As to a
25 creditor, we're talking about the right to

1 object to a particular plan that leaves them
2 unimpaired. And although 1109(b) has that
3 general language, 1126(f) more specifically says
4 that an unimpaired creditor is presumptively --
5 is conclusively presumed to --

6 JUSTICE BARRETT: Well, Mr. Marshall,
7 maybe I'm not understanding about the plan
8 finding. I mean, it's true that, at the end,
9 the court said that Truck wasn't harmed. But,
10 you know, what if the -- what if the court had
11 decided otherwise? In the beginning, they don't
12 know whether it's going to be collusive or
13 violate Kaiser's duty of good faith, right?

14 Maybe I'm just misunderstanding. I
15 mean, it went in your favor, but --

16 MR. MARSHALL: Party-in-interest
17 status is a threshold question. You have the
18 right to come in and litigate whether you're a
19 party in interest or not. And that's all the
20 plan finding did. It determined that their
21 rights were not abridged and, therefore, they
22 were not a party in interest.

23 JUSTICE JACKSON: So -- but, Mr. --
24 Mr. Marshall --

25 MR. MARSHALL: If that had gone

1 differently, then, yes, they could have objected

2 --

3 JUSTICE GORSUCH: Mr. Marshall --

4 MR. MARSHALL: -- to the rest of the
5 plan, to the merits.

6 JUSTICE GORSUCH: Mr. Marshall, you've
7 agreed that they're -- they were a party in
8 interest to the extent they were a creditor,
9 right?

10 MR. MARSHALL: Yes.

11 JUSTICE GORSUCH: And normally a
12 creditor or a party in interest can be heard on
13 any issue. You agree with that?

14 MR. MARSHALL: That's the text of
15 1109(b).

16 JUSTICE GORSUCH: Okay. And you've
17 been citing 1124 and 1126 to us, I understand
18 and appreciate that, but that -- that governs
19 who can vote, right?

20 MR. MARSHALL: That is what it
21 explicitly says, yes.

22 JUSTICE GORSUCH: It doesn't talk
23 about what they can argue about or be heard on,
24 right?

25 MR. MARSHALL: It says they're

1 conclusively presumed to have accepted the plan.

2 JUSTICE GORSUCH: Right.

3 MR. MARSHALL: And an inference from
4 that is that it would be absurd to vote to -- in
5 favor --

6 JUSTICE GORSUCH: So, if you can't
7 vote, you can't be heard? Is that -- is that
8 your argument then?

9 MR. MARSHALL: You can't be heard on
10 the merits of the plan. And that's what the
11 circuit courts have said. We cited cases and
12 Truck cited some cases allegedly to the
13 contrary, but they're actually not, because all
14 they do is determine where -- whether the
15 creditor that wants to object to the merits of
16 the plan is actually impaired.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 JUSTICE THOMAS: No.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 JUSTICE GORSUCH: No.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 Justice Jackson?

4 JUSTICE JACKSON: Can I just ask one
5 question? At the threshold, you keep saying at
6 the threshold they have no interest in the
7 estate property.

8 Do you dispute that they have a
9 potential to have an interest in the estate
10 property, that insurers do? Because the plan
11 isn't in existence yet. Do you -- do you
12 dispute that they have the potential?

13 MR. MARSHALL: Borrowing from
14 intervention law, the question would be when is
15 their interest put at issue. And it's somewhat
16 like the -- which would be is a plan proposed
17 that would breach your contract and give you an
18 interest in the estate. And it's analogous to
19 what the actual history is with executory
20 contracts.

21 So the -- the -- the -- the tax -- the
22 statutory history that the government invokes
23 actually says -- suggests you're a party in
24 interest when there is a motion to reject an
25 executory contract because that would create a

1 claim, a breach, and make you a creditor.

2 JUSTICE JACKSON: I guess I don't
3 understand your answer, and I --

4 MR. MARSHALL: So when -- when it's
5 put at issue.

6 JUSTICE JACKSON: When it is put --
7 why isn't it put --

8 MR. MARSHALL: If you're an insurer,
9 you're not on the list. Nothing makes you --

10 JUSTICE JACKSON: Right --

11 MR. MARSHALL: -- a party in interest.

12 JUSTICE JACKSON: -- but the list says
13 "including," so we know there are things that
14 are -- that are -- there are entities that may
15 not be in the list, right?

16 MR. MARSHALL: Correct.

17 JUSTICE JACKSON: Okay. So the
18 question is they come to the table at the
19 beginning and they say: We think we should be
20 in the list because we have a potential through
21 the reorganization plan that will be adopted to
22 be affected.

23 And you say not party in interest
24 because you're not already affected or it's not
25 clear to us right now that you're affected. Is

1 that your position?

2 MR. MARSHALL: If we're talking about
3 Truck as insurer --

4 JUSTICE JACKSON: Yes.

5 MR. MARSHALL: -- yes.

6 JUSTICE JACKSON: All right. So --

7 MR. MARSHALL: But once a plan is
8 proposed --

9 JUSTICE JACKSON: Right.

10 MR. MARSHALL: -- that would breach
11 your contract --

12 JUSTICE JACKSON: So can I ask you, if
13 people who are not potentially affected are not
14 parties in interest, I guess I don't understand
15 Congress's suggestion that parties in interest
16 should be a part of the reorganization.

17 In other words, the context in which
18 their -- what -- what's valuable to them about
19 being a party in interest is the fact that they
20 then get to talk with everybody about how this
21 is going to go.

22 And the problem I'm having with your
23 argument is it suggests that it's only after we
24 know or after they know that they're definitely
25 affected that they get a seat at the table, but

1 the whole point of it is that the parties in
2 interest get to talk about it.

3 So it seems to me it would have to
4 include people who have a clear potential for
5 being affected by the plan that we're all
6 hammering out in this discussion.

7 MR. MARSHALL: There's nothing in
8 1109(b) itself that says that has to be
9 determined once and for all at the outset. And
10 if we're talking about someone who's not in the
11 list, the only way to know if you're a party in
12 interest is do you have an interest in the
13 bankruptcy estate.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Frederick.

18 ORAL ARGUMENT DAVID C. FREDERICK

19 ON BEHALF OF THE CLAIMANT RESPONDENTS

20 MR. FREDERICK: Thank you, Mr. Chief
21 Justice, and may it please the Court:

22 There are a number of questions I'd
23 like to address that you posed this morning, but
24 I want to start with one principle, which is
25 that the Bankruptcy Code was not intended to

1 protect insurers, except in a couple of places
2 where asbestos-related trusts are created, those
3 are in Section 524(g) principally, but in 109,
4 Congress said an insurer can't invoke bankruptcy
5 for protections under the code.

6 So, Justice Kavanaugh, to your
7 question about the text and practicalities,
8 Congress answered the question of whether an
9 insurer should be permitted to butt into a
10 debtor's bankruptcy and try to use it to protect
11 its own financial interests. The bankruptcy
12 process is designed to ensure that the debtor
13 can maximize its assets for the benefit of
14 creditors.

15 And so what the insurer as insurer is
16 doing here is seeking to co-opt the debtor's
17 bankruptcy for the purpose of protecting its own
18 interests.

19 Justice Thomas, I can start with the
20 timing question if you like.

21 JUSTICE THOMAS: Well, let -- well,
22 you can start with that, but also I think that
23 the -- their interest isn't so much in
24 feathering their own nest per se but, rather,
25 that they be treated with the anti-fraud

1 provisions the same way that the claims under
2 the trust are being treated.

3 MR. FREDERICK: Yes. And let me start
4 with -- I'm going to call these pretrial
5 disclosure requirements because Truck had six
6 months of discovery to try to prove any fraud
7 with the Kaiser claimants and came up with
8 crickets.

9 What they are calling anti-fraud
10 prevention measures are really requirements to
11 impose on state courts that before a claimant
12 can file a claim, a claimant has to comply with
13 what Truck wants for information that a state
14 court might or might not require under state
15 court rules of procedure.

16 So, if you were to accept the idea
17 that their nomenclature drives the outcome here,
18 you're essentially saying bankruptcy courts have
19 the authority to tell state courts how to do
20 their discovery process.

21 And, Justice Barrett, that's why we're
22 fighting this, because the claimants shouldn't
23 be required to impose on themselves and their
24 families a lot of information that if Truck
25 really wanted it, it could ask for it in state

1 court discovery proceedings and state court
2 judges could decide --

3 JUSTICE SOTOMAYOR: Mr. Frederick --

4 MR. FREDERICK: -- is that relevant or
5 burdensome or not.

6 JUSTICE SOTOMAYOR: -- why do all
7 these other circuits and other bankruptcy courts
8 impose it? If they felt the same way that
9 you're arguing, are they violating the
10 Bankruptcy Code by -- or -- or disrespecting
11 state courts because that's what they require?

12 MR. FREDERICK: No. The requirements
13 here are only for a very small class of claims
14 that are called extraordinary claims. And they
15 are extraordinary claims, it's defined at JA
16 427, under the plan. These are not insured
17 claims where the claimant is seeking to say that
18 Kaiser was responsible for the vast bulk of its
19 exposure to asbestos.

20 And in that very unusual circumstance,
21 which actually in the implementation of this
22 plan hasn't arisen yet, the requirement is for
23 that claimant to come forward with proof of a
24 negative, that it hadn't been exposed to
25 asbestos by any other potential tortfeasor. And

1 so we're talking about a very narrow class with
2 a description for a very particularized purpose
3 that Truck wants to appropriate and force so
4 that claimants will have less of an opportunity
5 to invoke their jury trial rights in state
6 court, which are protected under the U.S. Code.

7 JUSTICE SOTOMAYOR: But why -- why
8 should you as the debtor trust have that
9 advantage and not give it to them?

10 MR. FREDERICK: Because --

11 JUSTICE SOTOMAYOR: That's -- that's
12 the difference in treatment that they're
13 claiming is contrary to the plan.

14 MR. FREDERICK: It's not for this
15 reason. The -- the treatment by Kaiser of Truck
16 is exactly the same before bankruptcy as it was
17 now. Truck agreed contractually --

18 JUSTICE SOTOMAYOR: But bankruptcy
19 changes everyone. It changes who the debtor is
20 to the trust. It -- by its own terms, it's
21 extinguishing the debtor's obligation --
22 obligations to anyone, except under the extant
23 contract, but the incentives are different.
24 There is inherent change.

25 MR. FREDERICK: That's why the

1 principle of insurance neutrality, which was
2 developed 30 years ago in the courts of appeals
3 and has actually followed in every single court
4 of appeals that has addressed this question, has
5 looked at whether the insurers' legal
6 obligations are altered, and if they are not --

7 JUSTICE SOTOMAYOR: You're still --
8 then circle back to my initial question. Other
9 bankruptcy courts have imposed these same
10 requirements and they've done it. Are they
11 breaching bankruptcy law? Are they stepping on
12 state courts in an improper way? What are they
13 doing? And why are you fighting something that
14 you admit your claimants in discovery might well
15 have to give up?

16 MR. FREDERICK: Because it's up to the
17 state court to decide that.

18 JUSTICE SOTOMAYOR: Why?

19 MR. FREDERICK: Because they are the
20 ones that will be superintending discovery.

21 JUSTICE SOTOMAYOR: But what -- what
22 does that have to do with the --

23 MR. FREDERICK: Because the --

24 JUST SOTOMAYOR: What does that have
25 to do with anything? Meaning, you know, if --

1 if -- you eventually in -- in most jurisdictions
2 will have to give up something like that because
3 there is very few jurisdictions who would say
4 they have to pay the entire cost if there's
5 multiple exposures or they have to pay the
6 entire cost if other people have paid you.
7 That's all that's being sought.

8 MR. FREDERICK: It's more than that,
9 Justice Sotomayor, which is why they're fighting
10 so hard for it. And -- and I want to make this
11 very clear, that the point of the extraordinary
12 procedure is because the trust itself is having
13 to pay the claims. They are not insured by
14 definition. And to protect --

15 JUSTICE SOTOMAYOR: That's the whole
16 point.

17 MR. FREDERICK: No.

18 JUSTICE SOTOMAYOR: You're trying to
19 give yourself something more than you're giving
20 someone else, and you want to reach into their
21 pocket and say I'll give myself more than you.

22 MR. FREDERICK: Because the contract
23 of insurance, which they litigated for 19 years
24 in California state courts, definitively
25 determined they will have to pay the claimants

1 who are insured --

2 JUSTICE KAGAN: So I think I'm getting
3 the equities of this, Mr. Frederick, as you
4 describe it, is that they had a contract and
5 they've been protected as to that contract, and
6 they're just looking to get a better deal now
7 and to kind of take advantage of the bankruptcy.
8 So I'm getting the equities here.

9 I'm not getting where you derive from
10 the text the idea that they're not parties in
11 interest because they have a material interest
12 in what comes out of the bankruptcy proceeding,
13 and they can improve their position materially
14 in the bankruptcy proceeding.

15 MR. FREDERICK: The cases that we cite
16 historically under the Transportation Act of
17 1920 make very clear that if you're just seeking
18 a benefit, you don't get party-in-interest
19 status. You have to show aggrievement and harm
20 to your pre-position.

21 JUSTICE KAGAN: So those are some
22 1920s cases. Do you have anything in the text
23 that can suggest that the text has incorporated
24 that view?

25 MR. FREDERICK: We don't have anything

1 like that, although I would point to the history
2 that the Debtors' brief very helpfully lays out,
3 which explains how the original -- origination
4 of the Bankruptcy Code went through these
5 iterations and accepted those principles for
6 party in interest.

7 And I think that it makes sense from
8 an Article III perspective too because the other
9 side is essentially saying Article III has no
10 role to play here, where a bankruptcy process is
11 a multifaceted fight over a res. What is the
12 debtor's estate? Who gets that property?

13 And so those claims are going to be
14 somewhat flowing in and out. And it is
15 imperative in the 524(g) context that you
16 recognize Article III has a role to play. Why?
17 Because the district court has to enter the
18 final injunction. The bankruptcy court does not
19 have the authority to do that under the statute.

20 JUSTICE GORSUCH: Mr. Frederick, I
21 certainly get your arguments and why they might
22 persuade a bankruptcy court to rule for you and
23 not require these anti-fraud provisions.

24 But I think you've admitted that a
25 court can do those provisions and they have done

1 them in other cases lawfully, right?

2 MR. FREDERICK: For the trust's
3 benefit, but not where there's an insurance
4 neutrality --

5 JUSTICE GORSUCH: Okay.

6 MR. FREDERICK: -- clause.

7 JUSTICE GORSUCH: So -- so -- so the
8 question becomes, can they be heard? That's the
9 only question before us. Can they be heard at
10 all? And I guess I'm struggling on that one.

11 We're not discussing the power of the
12 court. We're not discussing what it might rule.
13 We're only discussing who can be heard. And I
14 think you -- you have to acknowledge that there
15 are creditors who can be heard, even if it's a
16 virtual certainty that they will get nothing or
17 a virtual certainty they will get a hundred
18 cents on the dollar.

19 MR. FREDERICK: Right.

20 JUSTICE GORSUCH: They still can be
21 heard.

22 MR. FREDERICK: They can be heard
23 until the point where their impairment is
24 determined.

25 JUSTICE GORSUCH: Well, they -- they

1 may not have a vote, but they can be heard on
2 any issue. No?

3 MR. FREDERICK: Until their impairment
4 has been determined, Justice Gorsuch. That's
5 the key point. That's --

6 JUSTICE GORSUCH: Where do you get
7 that from?

8 MR. FREDERICK: 1126(f).

9 JUSTICE GORSUCH: That's -- that's who
10 votes.

11 MR. FREDERICK: But the point of
12 voting is who can hear, and the whole point of
13 the chart which you can see the bankruptcy
14 court's determination, is who's impaired or not
15 because the bankruptcy court has to get to an
16 end place. There were a dozen insurers here,
17 and under their position, there is no limiting
18 principle to any of those insurers who could
19 continue to fight because they want to get
20 benefits out of a bankruptcy process that
21 Congress foreclosed to them.

22 JUSTICE GORSUCH: Do you agree on
23 Article III that that's with respect to a
24 plaintiff coming to court and not with respect
25 to those who object under Bond and Clapper?

1 MR. FREDERICK: No, I don't agree with
2 that.

3 JUSTICE GORSUCH: You disagree with
4 Bond and Clapper on that?

5 MR. FREDERICK: I think that -- I
6 think Clapper is actually more helpful for our
7 side, Justice --

8 JUSTICE GORSUCH: What about Bond?

9 MR. FREDERICK: Bond, I think that the
10 point is where the effort by the objector in
11 this situation is seeking to get a benefit and
12 must show under Article III that it has injury
13 in fact that is redressable and traceable to the
14 plan.

15 Here, Truck can't satisfy either
16 because its redressability problem is really
17 because they think state courts are not going to
18 be adequate to police fraud, and they don't --
19 they are not able to trace their harm as insurer
20 to the plan because of the insurance neutrality
21 provision.

22 And so I think there's a very serious
23 Article III question here that Truck has
24 essentially glided by in this argument this
25 morning, but I want to urge you to take that

1 very seriously because it can't be the case that
2 we have, like, a law school seminar or anybody
3 who wants to come and talk gets to talk. The
4 whole point of a bankruptcy proceeding is get to
5 a confirmed plan, and the only way to do that is
6 to weed out the people who have something that
7 they want to say and to have different threshold
8 provisions.

9 So, Justice Thomas, I wanted to get
10 back to your timing question. At the disclosure
11 statement, the -- the debtor has to present a
12 plan. That is where the issues of insurance
13 neutrality typically are going to be addressed.
14 And at confirmation, we are knowing then that
15 the creditor is impaired or not impaired.

16 So those are the two key timing
17 mechanisms. It can't be at the outset of a
18 bankruptcy because there isn't enough known
19 about the nature of the estate --

20 CHIEF JUSTICE ROBERTS: Well, if he's
21 not impaired, doesn't he have an interest in
22 making sure that doesn't change?

23 MR. FREDERICK: He does, but that's
24 where the confirmation of the plan comes in.
25 And that's why, if you look at the chart, Mr.

1 Chief Justice, there's a -- this group is
2 unimpaired, this group is unimpaired because
3 they are paid in full.

4 And Truck was paid in full for its
5 premiums. So it is not an executory contract,
6 which, under the Vern Countryman definition, was
7 where there was un- -- lack of performance on
8 both sides of the contract. Here, the Debtor
9 performed on the contract. The Debtor paid all
10 the premiums.

11 And so it is a non-executory contract,
12 which I think helps give the lie to the
13 government's position that calling something an
14 executory contract is somehow going to solve the
15 problem here, where you've got performance that
16 is occurring at different levels and at
17 different stages.

18 And that's why the DOJ policy manual
19 itself says be very careful about invoking
20 executory contracts because they're not defined
21 in the bankruptcy code and it's very difficult
22 to know how to administer them in practice.

23 And so for the government to be
24 suggesting that you have a test here that is so
25 malleable, where the interests of claimants and

1 creditors is critically important to
2 understanding how to weed out the various
3 muckrakers, where the United -- and I would
4 point you to the policyholders' brief, pages 12
5 to 14, which talks about just how long the
6 insurers have an interest. Why? Delay is
7 profit-maximizing. Every day insurers do not
8 have to pay on their claims is a good day for
9 the insurers, and so they have every incentive
10 to tell their lawyers: Go in and object to
11 everything because that will delay the process.

12 We could have had this plan confirmed
13 five years ago. The only objector was Truck.
14 Every other insurance company agreed to the
15 plan. And so, by adopting some rule that
16 everybody gets to be heard and everybody gets to
17 participate --

18 JUSTICE BARRETT: Truck -- isn't Truck
19 on the hook for the majority of claims?

20 MR. FREDERICK: Truck and other
21 insurers.

22 JUSTICE BARRETT: But doesn't -- isn't
23 Truck responsible for the lion's share?

24 MR. FREDERICK: That's what they say,
25 and I have no reason to doubt it. But, Justice

1 Barrett, where do you draw the line there? Do
2 you say they're an insurer that's responsible
3 for two-thirds gets it? We heard the --

4 JUSTICE BARRETT: I was just saying
5 that it means less that other insurers didn't
6 object if they didn't have the same stake in the
7 claims.

8 MR. FREDERICK: We don't know what the
9 comparative issues are. The excess insurance
10 part is under a confidentiality standard that I
11 have not seen, and I can't tell you in court
12 what that entails.

13 JUSTICE BARRETT: Could you be a party
14 in interest at the --

15 MR. FREDERICK: But what I can say,
16 Justice Barrett, is that it can't be a size
17 issue because there's no way to draw a line on a
18 size issue. What do you say? It's a quarter is
19 enough, or six insurance companies, that each
20 have an equal stake, is enough? How do you --
21 there's no --

22 JUSTICE BARRETT: Can I ask you a
23 timing question? Can you be a party in
24 interest -- I'm just trying to understand your
25 point about how things change as the -- as the

1 plans develop.

2 Chief, do you want me to --

3 CHIEF JUSTICE ROBERTS: Sure. No.

4 JUSTICE BARRETT: -- stop?

5 CHIEF JUSTICE ROBERTS: Go ahead.

6 JUSTICE BARRETT: Can you be a party

7 in interest at the beginning and then not be a

8 party in interest as it becomes clear your

9 interest isn't impaired? Is that what you're

10 saying?

11 MR. FREDERICK: I'm saying that

12 impairment is treated differently. So you can

13 be a creditor --

14 JUSTICE BARRETT: Yeah.

15 MR. FREDERICK: -- and a party in

16 interest, but you are not allowed then to vote

17 on a plan and thereby exercise your voice

18 through your vote.

19 JUSTICE BARRETT: Okay.

20 MR. FREDERICK: The -- the code treats

21 that differently. And it's odd to suppose that

22 an unenumerated party like an insurance company

23 is treated better than an insurance -- than a --

24 than a creditor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 I just want to follow up. You were
3 just making the point that you can't draw that
4 line.

5 I mean, the law does that all the
6 time, right? I don't care where it is and it
7 may be the majority or a significant part of it
8 or whatever.

9 MR. FREDERICK: And -- and that's why
10 I think looking to the guidance of the courts of
11 appeals is actually humbling at one level but
12 also instructive.

13 For 30 years, courts of appeals have
14 looked at this idea of insurance neutrality to
15 determine whether a plan is materially altering
16 preexisting legal obligations.

17 In those cases where the court has
18 said yes, it is, insurance companies are allowed
19 to be parties in interest. That's the Thorpe
20 case out of the Ninth Circuit, the Global case
21 out of the Third Circuit.

22 But, in those situations where there's
23 an insurance neutrality provision and the
24 insurance company is not able to say with any
25 proof that its legal obligations are materially

1 altered, the courts of appeals have said:

2 You're not a party in interest.

3 CHIEF JUSTICE ROBERTS: Well, wouldn't
4 Truck want to have something to say about the
5 division that you've just cited?

6 MR. FREDERICK: And they do, Mr. Chief
7 Justice, because that issue is litigated. When
8 my friend was talking about this being at the
9 threshold, the whole question is, is the
10 insurance company's legal obligations, are they
11 impaired or not? And that fight is a very
12 vigorous fight in --

13 CHIEF JUSTICE ROBERTS: But it's -- it
14 -- that fight continues beyond what you're
15 calling the threshold.

16 MR. FREDERICK: It -- it -- it does
17 and it is. But, at a point where the plan is
18 confirmed and we know there will be insurance
19 neutrality, and we know that their rights as a
20 creditor are not giving them a right to vote, at
21 that point, it should stop and the four years
22 that we spent doing appellate litigation here
23 ought not to be necessary.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 Justice Sotomayor?

2 Justice Kagan?

3 Justice Gorsuch?

4 JUSTICE KAVANAUGH: Can I just ask
5 because you called them muckrakers?

6 (Laughter.)

7 JUSTICE KAVANAUGH: The -- the amicus
8 brief for the professors on the other side, and
9 you can just respond to this, says, "Indeed,
10 when an insurer faces millions of dollars in
11 financial liability, like Petitioner does here,
12 common sense and fundamental bankruptcy policy
13 dictate that it be considered a party in
14 interest in the bankruptcy proceeding."

15 So you can just -- I mean, this is
16 repeating what you've said probably, but that
17 sounds different from muckrakers.

18 MR. FREDERICK: Well, what I would
19 say, Justice Kavanaugh, is that a party in
20 interest has extraordinary rights. They have
21 the right to contest the trustee, the
22 appointment, the powers of the trustee. They
23 can object to the lifting of the automatic stay.
24 They can ask for the elimination of a plan.
25 They can ask for the transformation of it from a

1 Chapter 11 to a Chapter 7.

2 And those powers are -- are -- are and
3 rights are very powerful and they take
4 bankruptcy courts an enormous amount of time to
5 thoughtfully and conscientiously work their way
6 through.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: No.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 Thank you, counsel.

14 MR. FREDERICK: Thank you.

15 CHIEF JUSTICE ROBERTS: Ms. Ho, you
16 have rebuttal.

17 REBUTTAL ARGUMENT OF ALLYSON N. HO

18 ON BEHALF OF THE PETITIONER

19 MS. HO: Thank you, Mr. Chief Justice.
20 Three points. Two quick and one a little bit
21 longer.

22 One, just to really underscore
23 1126(f), that is about voting. That is not
24 about what 1109(b) about, which is being heard,
25 two very different things.

1 Number two, on intervention, Congress
2 did away with the requirement that parties in
3 interest must intervene when it replaced 206 and
4 207 with 1109(b).

5 And three, my -- my friends have
6 talked a lot about the insurer in this case
7 trying to get something out of the bankruptcy or
8 seek a benefit.

9 Trying to stem the tide of over
10 inflated claims is not seeking a benefit. It's
11 just trying to make sure that the plan complies
12 with the code as bankruptcy judges have an
13 independent duty to ensure.

14 And even if you disagree with me on
15 that, it's -- it's undisputed that Truck is
16 going to pay the vast bulk of claims in this
17 case, that the plan finding adjudicates Truck's
18 insurance rights, that Truck is a creditor
19 because the insurance deductible, so it really
20 is a party in interest several times over. And
21 I haven't heard from my friends on the other
22 side any justification for reading any issues
23 out of the text.

24 1109(b) gives stakeholders a voice,
25 not a vote and certainly not a veto. We would

1 respectfully ask the Court to reverse and
2 remand.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MS. HO: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

8 (Whereupon, at 12:50 p.m., the case
9 was submitted.)

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